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No. 00-530

In the Supreme Court of the United States

BECTON DICKINSON AND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the statute of limitations established in 26 U.S.C. 6532(c) for actions against the United States for a wrongful levy is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 215 F.3d 340. The opinion of the district court (Pet. App. 36a-53a) is reported at 24 F. Supp. 2d 375.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2000 (Pet. App. 34a-35a). Justice Souter granted petitioner an extension of time in which to file a petition for a writ of certiorari to and including October 6, 2000, and the petition for certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1995, the Internal Revenue Service filed notices of federal tax lien against Reinhard Wolckenhauer to secure payment of a total of $865,240.06 of income tax owed by him for the 1988 through 1991 tax years. In addition, the Service served a notice of levy on Becton Dickinson and Company (petitioner), directing it to pay to the government all money owed to, or held on behalf of, Wolckenhauer. Pet. App. 4a; C.A. App. 73-74, 83, 219-220. On May 2, 1995, petitioner paid the Service the sum of $323,948.44, which represented the entire amount of Wolckenhauer's entitlement as a participant under the Becton Dickinson Retirement Plan. Pet. App. 4a.[1]

During the years that Wolckenhauer was an employee of petitioner, he had defrauded petitioner by means of an elaborate scheme involving fraudulent purchasing invoices. Pet. App. 3a-4a. On March 22, 1996, approximately 11 months after petitioner remitted Wolckenhauer's pension funds to the government, taxpayer pled guilty to criminal counts alleging conspiracy, mail fraud and the filing of false income tax returns. It was stipulated in that proceeding that petitioner lost approximately $1,500,000 to $2,500,000 from Wolckenhauer's criminal activities. *Id.* at 4a. The sentencing judge entered an order in that criminal case on September 24, 1996, requiring Wolckenhauer to make restitution to petitioner in the amount of $2,200,000. *Ibid.*

2. The present suit was originally brought by petitioner against Wolckenhauer and others to obtain recovery of damages resulting from the fraudulent billing

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[1] It is undisputed that the funds in taxpayer's pension account were not derived from his criminal activities.

scheme. On November 7, 1996, after the restitution order was entered in the criminal case, petitioner filed an amended complaint in this civil action to assert a claim against the government under 26 U.S.C. 7426(a)(1) for a wrongful levy of the pension funds paid over by petitioner on May 2, 1995. Pet. App. 4a-5a.

On May 29, 1997, however, the Third Circuit vacated the September 24, 1996, restitution order and remanded the case to the district court for additional fact-finding concerning Wolckenhauer's assets and the needs of his dependent family members. On March 12, 1998, the sentencing judge amended the restitution order to require Wolckenhauer to make restitution in the sum of $83,200. On July 15, 1998, at the request of petitioner, the sentencing judge modified the March 12, 1998, restitution order to take into account the possibility that petitioner might prevail in its wrongful levy action against the government. The amended restitution order requires Wolckenhauer to make restitution to petitioner in the total amount of $407,148.44—consisting of the $83,200 restitution amount previously awarded plus the $323,948.44 sought by petitioner in this wrongful levy action. The order further provides that this amount is to be reduced to $83,200 in the event that petitioner does not obtain a favorable judgment in the present case. Pet. App. 5a.

3. The district court granted summary judgment to the government on petitioner's wrongful levy claim. Pet. App. 36a-53a. The court first considered whether petitioner's wrongful levy suit is barred by 26 U.S.C. 6532(c)(1), which provides that "no suit or proceeding * * * shall be begun after the expiration of 9 months from the date of the levy * * * giving rise to such action." Although petitioner's amended complaint is untimely under the plain text of this statute because it

was filed more than nine months after the date of levy, the court concluded that this nine-month period of limitations could be extended by equitable tolling. Pet. App. 40a-47a. The court held, however, that equitable principles do not support tolling in this case and that the wrongful levy claim is therefore barred by the statute of limitations. *Id.* at 48a-50a.

The court further concluded that, even if tolling of the statute of limitations were justified in this case, petitioner could not prevail on the merits. Pet. App. 50a-52a. The court concluded that the restitution order gave no specific rights in the pension funds to petitioner, and that any interest that petitioner obtained through the restitution order (or otherwise possessed in such funds) was therefore subordinate to the government's prior tax liens. *Id.* at 51a-52a. Because of the government's prior right in these funds, the levy was not wrongful. *Id.* at 52a.

4. The court of appeals remanded the case to the district court with instructions to dismiss the case for lack of subject matter jurisdiction. Pet. App. 10a-33a. The court concluded (i) that principles of equitable tolling cannot override the statute of limitations Congress has provided for wrongful levy actions and (ii) that petitioner's wrongful levy action is therefore barred because it was not brought within the nine-month period specified by the statute. *Ibid.*

The court noted that the nine-month limitations period of Section 6532(c) constitutes a condition imposed by Congress on the waiver of sovereign immunity for wrongful levy actions, and that this waiver may not be extended absent a specific congressional intent to do so. Pet. App. 12a-14a. The court stated that there is abundant evidence that Congress in fact did *not* intend to permit equitable tolling in wrongful levy actions.

First, like the limitations period for filing claims for refund of tax at issue in *United States* v. *Brockamp*, 519 U.S. 347 (1997), the nine-month limitations period for instituting a wrongful levy action applies only to suits brought against the government and has no application to suits brought against private defendants. The court concluded that the "rebuttable presumption" of equitable tolling described in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), for statutes of limitations that apply in actions that could be brought against both private defendants or the government is not applicable in the different context of this case. Pet. App. 14a-16a, 20a-22a.

The court of appeals further noted that, like the limitations period involved in *Brockamp*, Section 6532(c) establishes its time limitation in an emphatic, nonpermissive form and contains explicit exceptions to the basic limitations period that do not include equitable tolling. Pet. App. 23a. The court also observed that, as in *Brockamp*, the limitations provision involved here is a tax statute, for which "case-specific exceptions reflecting individualized equities" are not the norm. Pet. App. 24a (quoting *Brockamp*, 519 U.S. at 352).

The court of appeals further emphasized that, as with the statute of limitations for refund claims involved in *Brockamp*, allowing equitable tolling in wrongful levy actions would create "serious administrative problems." Pet. App. 25a. Since anyone claiming an interest in the property may bring a wrongful levy action, the court concluded that the administrative problems would be even more acute in this context than they were in the refund context involved in *Brockamp*. The court stated that delay in the final disposition of competing claims would undermine the plain purpose of the nine-month limitations period, which is to provide certainty and

finality to levy proceedings. Permitting tardy challenges to a levy would jeopardize the ability of the government to collect taxes from other assets of the taxpayer if necessary. Pet. App. 24a-26a.

Based upon this review of the language and purpose of the statute, the court of appeals concluded that "Congress did not intend for the time limitation in section 6532(c) to be equitably tolled." Pet. App. 32a. The court noted that its decision on this issue is consistent with the decisions of several other courts of appeals. *Id.* at 27a-29a (citing, *e.g.*, *Miller* v. *Tony & Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998); *Amwest Surety Ins. Co.* v. *United States*, 28 F.3d 690, 691 (7th Cir. 1994); *Williams* v. *United States*, 947 F.2d 37, 40 (2d Cir. 1991)).

ARGUMENT

1. The decision of the court of appeals properly implements the principles established by this Court in *United States* v. *Brockamp*, 519 U.S. 347 (1997), and *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990).

a. Under *Irwin* and *Brockamp*, a rebuttable presumption exists that equitable tolling may be permitted in suits against the government for actions of a type that may also be brought against private defendants. When a limitations period is subject to equitable tolling in a suit involving private parties, the Court has concluded that it is appropriate to assume that equitable tolling would also be available in an identical suit brought against the government. *Irwin*, 498 U.S. at 95 (because private defendants may be sued under 42 U.S.C. 2000e-5, and because the limitations period could be equitably tolled in lawsuits between private litigants, Congress must have intended for the time

limitation also to be subject to equitable tolling in lawsuits brought against the government). No such rebuttable presumption has been adopted, however, for suits that can be brought only against the government. Because a wrongful levy action was created by Congress as a "new type[] of action" (H.R. Rep. No. 1884, 89th Cong., 2d Sess. 28 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess. 30 (1966)) that may be maintained only against the United States (26 U.S.C. 7426(a)(1)), the time limitation set forth in Section 6532(c) for instituting a wrongful levy action is not presumptively subject to equitable tolling.

b. Moreover, as the court of appeals correctly concluded, there is good reason to believe that Congress did not intend for the equitable tolling doctrine to apply to the statutes that govern actions for the recovery of taxes paid to the United States. See *Brockamp*, 519 U.S. at 350. As with the statute involved in *Brockamp*, the language of Section 6532(c)(1) is emphatic in stating that "*no suit* or proceeding under section 7426 [wrongful levy actions] *shall be begun after the expiration of 9 months from the date of levy.*" 26 U.S.C. 6532(c)(1) (emphasis added). As in *Brockamp*, the language of Section 6532(c) "cannot easily be read as containing implicit exceptions." 519 U.S. at 350.

Furthermore, Section 6532(c) contains a narrow, explicit exception to its nine-month limitations period. Under Section 6532(c)(2), if a request is made for the return of property, the nine-month limitations period is extended for the shorter of 12 months from the date of filing the request, or six months from the mailing of notice disallowing the request. 26 U.S.C. 6532(c)(2). Moreover, Congress has expressly tolled the statute of limitations on collection of a tax during the period that a wrongful levy action is pending. 26 U.S.C. 6503(f)

(1994 & Supp. IV 1998). Thus, here, as in *Brockamp*, 519 U.S. at 351, Congress has expressly considered when exceptions to the applicable limitations periods are to be available - and the exceptions authorized by Congress do not encompass equitable tolling. See also *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) (generalized principles of equitable tolling are not available when the statute has provided a narrower tolling principle).

Equitable tolling of the limitations period of Section 6532(c) would also defeat the clear intent of Congress to protect the collection process by requiring all claims of third parties against property subject to levy to be asserted shortly after the levy is made. As the court explained in *Gordon* v. *United States*, 649 F.2d 837, 843-844 (Ct. Cl. 1981) (footnote omitted):

> Congress was clearly concerned that levy contests more than 9 months after the levy would prevent ultimate collection of the tax, thereby endangering the federal treasury. The problems of administration become inordinately more complex after a levy is set aside, for the Government must begin anew to collect the delinquent tax. Physical collection becomes far less likely, as taxpayers may have disappeared or disposed of their assets in the intervening period. Section 110(b) of the Tax Lien Act (presently, I.R.C. § 6532(c)) addresses the concerns by requiring levy contests to be made within 9 months of the levy.

Other courts have similarly concluded that "the intent of Congress" was "that a short nine-month limitations period is desirable for disputes involving tax levies because the government needs to know sooner rather than later whether it must look to other assets of the

taxpayer to satisfy the taxpayer's liability." *Fidelity & Deposit Co.* v. *City of Adelanto*, 87 F.3d 334, 337 (9th Cir. 1996). See also *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (5th Cir. 1980) ("§ 6532(c) protects the legitimate interest of the United States in requiring other claimants of the seized property to bring their claims quickly"); *Dahn* v. *United States*, 127 F.3d 1249, 1253 (10th Cir. 1997) (the nine-month limitations period of Section 6532(c) "effectuated Congress' judgment" that the government's need to know whether it must look to other assets to collect a tax owed warranted a shortened limitations period).[2]

2. Petitioner errs in asserting (Pet. 8) that certiorari is warranted to resolve an asserted conflict between the decision in this case and the decisions of the Ninth Circuit in *Capital Tracing, Inc.* v. *United States*, 63 F.3d 859 (1995), and *Supermail Cargo, Inc.* v. *United States*, 68 F.3d 1204 (1995). In those pre-*Brockamp* cases, the Ninth Circuit interpreted *Irwin* as expansively establishing a proposition that equitable tolling applies in *all* cases against the government, including wrongful levy cases brought under 26 U.S.C. 7426. In *Brockamp*, however, this Court repudiated that broad reading of *Irwin*. Until the Ninth Circuit addresses this issue in light of this Court's decision in *Brockamp*,

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[2] See also Staff of H.R. Comm. on Ways and Means, 89th Cong., 2d Sess., *Legislative History of H.R. 11256*, at 116, 168, 169, 236, 237 (1966) (describing the importance to the collection of federal revenues of resolving controversies concerning levied property quickly); W. Plumb, *Federal Tax Liens* 262 (3d ed. 1972) ("[s]ince the controversy over ownership of (or priorities in) the property levied upon leaves it doubtful whether the levy has in fact satisfied the taxpayer's account, a short statute of limitations is imposed on all such suits in order to force the issue promptly to a head").

the post-*Irwin*, pre-*Brockamp* decisions of that circuit in *Capital Tracing* and *Supermail Cargo* are not reliable predictors of the Ninth Circuit's stance on this question. See *Webb* v. *United States*, 66 F.3d 691, 698 n.3 (4th Cir. 1995) (disagreeing with *Capital Tracing*).[3] It is instead reasonable to assume that, in light of *Brockamp*, the Ninth Circuit will return to the prior decisions of that circuit that had held that "equitable tolling could *not* be applied" to avoid the statutes of limitations for such actions (*Supermail Cargo, Inc.* v. *United States*, 68 F.3d at 1207).

3. Petitioner also errs in suggesting (Pet. 13) that the decision of the court of appeals directly conflicts with the decision of the Ninth Circuit in *Cedars-Sinai Med. Ctr.* v. *Shalala*, 125 F.3d 765 (1997). In *Cedars-Sinai*, the court stated that, since federal statutes of limitations are generally not jurisdictional in nature, and since the statute of limitations applicable to suits for review of agency regulations under the Administrative Procedure Act "makes no mention of jurisdiction but erects only a procedural bar," that limitations period is "not jurisdictional." *Id.* at 770. The distinction between jurisdictional and procedural bars, however, is immaterial to this case. Viewed either as a procedural or as a jurisdictional bar, the statute of limitations was not subject to equitable tolling and the complaint was therefore properly dismissed. Pet. App. 32a-33a, 52a.

In any event, *Cedars-Sinai* does not involve the statute of limitations for wrongful levy actions. There

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[3] *Capital Tracing* was cited by the Ninth Circuit with approval in the post-*Brockamp* case of *Wilson* v. *Marchington*, 127 F.3d 805, 815 n.10 (9th Cir. 1997), cert. denied, 523 U.S. 1074 (1998), for the unremarkable proposition that, in a tort action between private litigants, equitable tolling may apply when the plaintiff has timely asserted his rights in the wrong forum.

is thus no conflict between these decisions to warrant review by this Court.[4]

4. Finally, petitioner errs in contending (Pet. 9-12) that certiorari should be granted to protect victims of crime from the consequences of a federal tax lien. The statute cited by petitioner was not enacted until 1996, and, as petitioner acknowledged in the court of appeals, those provisions simply "do not apply here" (Appellant's Br. 13 n.2, & 9 n.1).[5] Prior to 1996, 18 U.S.C. 3663(h)(2) provided that an order of restitution in a criminal case may be enforced "by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action." Even if such an order of restitution were thought of as a judgment that could give rise to a judgment lien that could compete for

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[4] *Perez* v. *United States*, 167 F.3d 913, 915-916 (5th Cir. 1999), on which petitioner also relies (Pet. 24), is even further from the mark. That case concerned whether equitable tolling is permitted under the Federal Tort Claims Act, 28 U.S.C. 2401(b). Because that Act makes the government liable for torts "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674), the analysis required by *Irwin* and *Brockamp* in that context differs fundamentally from the analysis to be applied for wrongful levy suits. See page 7, *supra*. Indeed, the court in *Perez* specifically acknowledged that *Brockamp* rendered untenable the notion that equitable tolling "would apply in all suits against the government." 167 F.3d at 916.

[5] Provisions of the Mandatory Victims Restitution Act of 1996 (contained in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214), upon which petitioner relies (Pet. 9-10; see also Pet. 11 (relying on 18 U.S.C. 3612 (1994 & Supp. IV 1998) and 18 U.S.C. 3572(b) (Supp. IV 1998) as amended in 1996)), apply only to convictions obtained after April 24, 1996 (Pub. L. No. 104-132, Tit. II, Subtit. A, § 211, 110 Stat. 1241).

priority with the federal tax lien,[6] the order of restitution involved in this case was issued 18 months after the government's tax lien was perfected by filing the notice of lien. The government's lien was therefore first in time and entitled to priority against petitioner's subsequent claim. See *United States* v. *McDermott*, 507 U.S. 447, 449 (1983) (the priority of a federal tax lien is governed by principles of first-in-time, first-in-right); see also *United States* v. *Security Trust & Sav. Bank*, 340 U.S. 47, 50 (1950) (principles of "relation back" are not applicable in determining the priority of a competing lien).[7]

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[6] In *United States* v. *Florence*, 741 F.2d 1066, 1067 (8th Cir. 1984), the court concluded that an order of restitution is not equivalent to a judgment for this purpose. 18 U.S.C. 3664(m)(1)(B) (1994 & Supp. IV 1998) now provides a means by which a victim of a crime may record a judgment of restitution and thereby obtain a lien on property of the defendant.

[7] We note, moreover, that the district court properly found "that plaintiff failed to actively and diligently pursue its judicial and statutory remedies" and that, even assuming equitable tolling would be available under Section 6532(c), "[e]quitable principles do not mitigate in favor of tolling the statute of limitations in this case." Pet. App. 50a. The question posed by petitioner thus has a hypothetical, rather than a practical, character in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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